PARTIAL TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE IDAHO SUPREME COURT,

CASE NO. 16455
MARCH 8, 1988

Justice Shepard: Counsel, again in your response to Justice Johnson, you are talking about the lack of records, the inability to know, the failure to be furnished certain things as I hear you. Who is Christine Pickford?

Mr. Morris: That is a special education psychologist for the school district.

Justice Shepard: What school district?

Mr. Morris: For the Boise School District and we had her do an evaluation.

Justice Shepard: Not in '83 or not in '84, but in 1982, is that correct?

Mr. Morris: No. The evaluation . . now we're talking about the records. The evaluation was done, as I understand it, between the August 29 meeting and the November meeting.

Justice Shepard: My view of the record would indicate that while Gabriel was still in the Meridian School District, an evalu-

ation was done by Dr. Pickford in September of 1982 to deter-mine his level of functioning and to make recommendations for appropriate educational placement.

Mr. Morris: That's true, that could be ..

Justice Shepard: Is that correct?

Mr. Morris: I'll concede that.

I, Frederick C. Lyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the oral argument transcript entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court

Frederick C. Lyon Clerk

By:_____ Deputy

MARCHBANKS Speaking not as an educator; you're not an educator, what changes have you . . as a parent . . have you seen in Gabriel since he has entered classes in

L. BAUGH The major thing I have seen with Gabriel at home is his inappropriate behavior has . . the major ones . . have solved. He no longer runs around the house making high-pitched barking noises or clapping . . his maladaptive behavior that is self-abusive behavior . . has stopped. We do not see any more self-abusive behavior at all. That behavior has been replaced by appropriate behavior . . that is, playing with other children . . playing games . . doing what other kids do.

MARCHBANKS What is Gabriel's program this year?

L. BAUGH Since he was recently evaluated by Mike Day, we have changed his program; we are now into more vocational programs. Gabriel is in a program to develop orbs or work

within the school environment. That is, he copies and collates teacher material; he works in the lunch line; he goes shopping that is . . we're trying to tech him vocational skills right now. We're trying to put his academic skills that he has been learning for the past couple of years into good practical use. That is, recognizing numbers and counting pages and such. He's in a program to recognize the alphabet . . he does recognize a good portion of it to write his needs . . counting . . one major goal that we have is for him to participate in classroom activities and for him to learn how to greet people and act appropriate in a community - in the school environment.

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BAUGH We had added vocational goals, more vocational goals, after the evaluation by Dr. Mike Day. His recommendation was that we move towards more of a vocational program for Gabriel and we his recommendations in Gabriel's program.

MORRIS Were those changes made with the Boise School District?

BAUGH They attended the Child Study Team when those goals were written.

MORRIS Weren't those changes as a result of Mike Day's written evaluation?

BAUGH That is correct. Boise School District agreed that Mike Day would be the evaluator; they agreed with the evaluating tools he would use.

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MARCHBANKS Based on your experience, do you think that the progress he made last year was satisfactory?

PRICE It was more than satisfactory as far as I was concerned.

MARCHBANKS How did he do in terms of achieving the goals that were set up?

PRICE He achieved them to a rate where it was essential at the time when I was working with Gabe . . we worked half days in school. He got to the point he was absor-bing so much that we needed more time in the day where-by his school . . involvement in

school . . it was obvious that it would have to be extended to a full-time because he was absorbing so much, and there was so much to

MARCHBANKS Did he accomplish

PRICE He certainly did.

MARCHBANKS How was his progress or his achievement of those goals?

PRICE Using daily activities chart and like a general IEP is established, it ended up with a percentage criteria at the end of that particular migrant period of working with Gabe.

MARCHBANKS How did Gabriel relate socially to other children last year?

PRICE Very very well, and vice-versa. It was interesting to see that there was no patronizing by the students working with Gabe. It was just a beautiful communi-cation, a very genuine kind of communication between Gabe's fellow classmates and Gabe beginning to take on and identify people by name and really had a good social interaction.

MARCHBANKS Gabriel is behind . . . chronologically last year and this year . . isn't that correct?

PRICE That's correct.

MARCHBANKS How is he physical-size wise? Is he much larger than the kids he's in school with?

PRICE No. No, he fits in very will with his classmates. There's no difference at all . . .

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MARCHBANKS With that background, can you tell us whether or not you have an opinion as to whether Gabriel is being educated satisfactorily at your school?

SISTER I would say now that I'm absolutely convinced that he's probably getting as appropriate an education as he can. When he first started, it certainly was a risk for us. I credit Lori Mallory, second grade teacher, it was her decision to accept him. She had said no, I don't think I would have taken him into the school, and for the first three weeks, it really was a risk that he would fit into that classroom or that the children would be accepting of him or all sorts of, you know, premonitions about

whatmight go wrong, but at this point in time . . seeing how he's grown, and how our children have certainly grown by his presence, I have no doubt whatsoever that what she's doing now is appropriate.

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MARCHBANKS From the point of view of an administrator, are you satisfied that the other children in Gabriel's class are getting an appropriate education?

SISTER Yes.

MARCHBANKS He's not so disruptive as to foul up the works . .

SISTER Oh . . no way. No way. He's added a dimension to their lives. They're tutoring him; they work with him; they vie for the chance too be with him and to play with him. It's done a lot for them.

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MARCHBANKS In your professional opinion, is Dr. Day's evaluation a good and appropriate one?

PICKFORD Mike Day is very well qualified and his report on Gabriel was organized and presented in the latest . . our latest understanding of appropriate programming goals for children who find it difficult to learn.

MARCHBANKS So that is yes?

PICKFORD Yes. Well . . I didn't want to just say yes 'cause I felt he needed a little for than that.

MARCHBANKS Have you reviewed . . had an opportunity to review the current educational plan for Gabriel?

PICKFORD Yes, I have reviewed it.

MARCHBANKS Is it an adequate plan, in your professional opinion?

PICKFORD Yes.

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MARCHBANKS Okay. As an educator, what is your opinion as to whether Gabriel is receiving an appropriate education in your class?

BECCI He's learning . . . from where he came in in September . . . what he can do now. In comparison to that, it has increased. He has . . so many things have changed . . I guess I don't know

where to start. Mmm, academically his knowledge has increased . . more so since going through some of the specifics that Mike Day pointed out to us that should be included in the new IEP for him. We have made changes in his seating arrangement in the classroom. He is no longer sitting off to the side like he used to. He is actually in one of the rows with the other children, and socially, you know, he's changed . . he's learned to do a lot of things that y'know are just normal routine in the classroom.

MARCHBANKS On Gabriel? Could you describe that process for us.

BECCI Actually, you should have heard us upstairs for about the last three hours, I guess. The IEP, y'know, it gives us a goal. But it's sort of . . I rely on a lot of the teaching techniques I know, and I watch what happens. If things we've tried, he doesn't respond to, we pull other things in. We work very well together. I may make a suggestion . . say, let's try this . . see if this might help us . . overcome a little trouble we may be having. We

worked . . she has an illustration of the writing paper . . we ended up coming about through us collaboration . . trying to figure out . . he couldn't learn to work with lined paper very well and we were sitting and talking one day, trying to figure out how to change it a little bit and I went home and sat down with a ruler and pencil and ditto master and came up with a new process that seems to have worked real well in keeping his letters more of a controlled size. But we do work, y'know. She takes suggestions well and I take suggestions from her well which I think helps.

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MARCHBANKS Based on what you've seen and what you know, is Gabriel making satisfactory progress in the placement?

BYRNE Yes, he is. I think just from the amount of improvement that he has shown from the first of the year, some examples would be . . printing his letters . . how many letters did I

say? At the first of year, he was printing the letters A and B, and now he prints letters A B D F H I L and M on command, you know, and that's just one part . . the alphabet letters A through K was what we were working on, and now we're working and A through R. That's . .

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? Does Boise School District offer regular classroom placement with an aide as an option for handicapped children?

NELSON One-to-one aide services? or just services?

NELSON Yes.

? Do you offer regular classroom instruction with indirect services in the regular classroom?

NELSON Yes.

? You offer regular classroom placement with direct services and instructional within

NELSON Yes.

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NELSON Sure.

NELSON We have a number of students that are enrolled in regular classes with direct service and instruction within the regular classroom. Most of that, we have interpreters that function in this capacity with students enrolled in the regular classes with interpreters that assist and help them in that capacity throughout the district.

? How are these aides funded?

NELSON Part B funds.

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MORRIS Okay. Let me . . I want to clarify that, too, because the petitioners have been very patient with me and I don't want to create the impression that we're attacking the overall education he is receiving. I'm using those for illustrative uroses to show that just the more specific issue of inapropriateness of integrating a person at Gabe's level into a regular classroom setting. That's just illustrating some of the disadvantages that we're talking about.

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MARCHBANKS Dr. Woychick, what is your understanding of how those emergency Part B funds are made available?

WOYCHICK Well, I believe they do have an aplication form. In fact, I think that at one point in my time in the district, we have applied for such funds but I'm not sure if they use that same form any longer. At one time, I believe, Martha Noffsinger gave some idea of the amount of funds available and also that there was quite a bit of competition for that source of funding.

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MORRIS I don't think we're contesting the overall appropri-ateness of Gabriel's education at St. Joseph's . . .

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

GABRIEL THORNOCK, Plaintiff, v. BOISE INDEPENDENT SCHOOL DIST., NO. 1, Defendant.	)	Case No. 85493 MEMORANDUM OPINION AND ORDER

This case is before the Court pursuant to an Amended Petition to review the decision of a Boise School District Hearing Officer as affirmed by a State Department of Education Hearing Officer. The administrative decisions held that plaintiff, Gabriel Thornock, a handicapped child, was not entitled to tuition reim-bursement or aide-services reimbursement from the defendant

school district for his private school education.

Some question has arisen as to the status of this case before this Court. Plaintiff Gabriel Thornock originally requested the Boise School District to appoint an impartial hearing officer for the case on November 23, 1983. The hearing was held before hearing officer Kenneth L. Mallea, Esq., on January 23-25, 1984. The hearing officer issued his decision on March 8, 1984, and proper notice of appeal was made on March 20. On appeal, the State Department of Education appointed Wm. Lyman Belnap, Esq. as the Review Officer. He released his decision affirming the hearing officer's decision on May 8, 1984.

On June 7, 1984, plaintiffs filed a "Petition for Judicial Review of a Final Decision of a Contested Case by an Administrative Agency I.C. 67-5201 et. seg. [sic]" in this Court. Fifteen days later (on June 22), plaintiffs filed an "Amended Petition for Judicial Review of a Final Decision of a Contested Case by an Administrative Agency I.C. 67-5201 et. [sic] seq. Both "petitioners" named the Idaho Department of Education, Jerry Evans, State Superintendent of Public Instruction, and Martha Noffsinger, Director of the Office of Special Education, as defendants along with Boise Independent School District No. 1. The Court, accepting the statement on the face of the petition that this is an appeal pursuant to I.C. §67-5201 et. seq., ordered the plaintiff to produce a transcript from the agency and set time limits for submission of

briefs. On October 31, 1984, oral arguments were held on the appeal.

During oral argument, the Department of Education and its two employees (the State defendants) argued that they should not be parties to the case. The argument was that the State's only act in this case was in appointing the Review Officer. Given this fact, they argued that they were no more proper parties on appeal than is a trial court judge when his decisions are appealed. Counsel for plaintiffs was given thirty days to respond to the State's argument. On December 2, counsel for plaintiffs and counsel for the State stipulated to voluntarily dismiss all defendants except Boise School District No.1. An order finally dismissing the State defendants was signed and filed December 18, 1984.

The Administrative Procedures Act (APA) states that "[a] person who has exhausted all administrative remedies . . . and who is aggrieved by a final decision in a contested case of an agency . . . is entitled to judicial review under this act." I.C. §67-5215(a). The APA defines agency as "each state board, commission, department or officer authorized by law to make rules or to determine contested cases . . . ." I.C. 67-5201(1). This dispute is between Gabriel Thornock and the Boise Independent School District. The evidentiary hearing was held before a hearing officer appointed by the school district. The dispute does not involve any "state board,

commission, department, or officer." (emphasis added.) Therefore, despite the label on plaintiff's petition, this case is not properly before the Court under the APA.

Having determined that the APA does not apply to this proceeding, the Court is left with the problem of identifying and clarifying the appropriate procedure to be followed in this case.

Rule 83(c) of the Idaho Rules of Civil Procedure provides that:

> "Where provided by statute, any final decision of any administrative or governmental agency, body or board may be appealed to the district court. All such appeals shall be by a trial de novo in the district court unless otherwise provided by a statute."

In this case we do have a controlling Federal Statute (20 U.S.C. §1415). That statute provides for a two-level adminis-trative review and further provides that after a final administra-tive decision "any party may bring an action under paragraph (2) of this subsection." (§1415(e)(2)). That paragraph of the subsection provides as follows:

> Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any

> party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, ... In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court deter-mines is appropriate.

(20 U.S.C. 1415(e)(2)).

As to the administrative proceedings, it is clear that the parties have recognized the controlling federal law in conducting this litigation. The parties have clearly followed the procedural steps outlined in 20 U.S.C. §1415(b)(2). The appeal to the Review Officer was conducted under §1415(c).

The statute, however, leaves the type of proceeding to be conducted by the Court somewhat conjectural. Several requirements of the administrative process seem significant but do not serve to eliminate the uncertainty. It is significant that the administrative proceeding is initiated by a "complaint" (20 U.S.C. §1415(e)(2)). Furthermore, any party is entitled to have a "verbatim record" kept of the administrative hearing and to require "written findings of fact and decisions." 20 U.S.C. §1415(d)(3),(4).

The perplexity is created when the foregoing statutory provisions are considered against certain fundamental requirements in any adjudicative process.

At the outset, to be effective, any adjudicative process requiring factual and legal determinations must have some procedure for defining and thus limiting the issues to be resolved. It is, of course, elementary that a trier has no basis for even determining what evidence is relevant or material without knowing what issues must be resolved. In the ordinary court action this function is performed by the pleadings. In this regard, the statute in question requires an initiating "complaint" but is silent as to any responsive pleading.

Second, if an appeal is to be provided there are generally three procedural methods of conducting an appeal. These are succinctly summarized by Judge Schwab in his concurring opinion in West v. City of Astoria, 524 P.2d 1216 (Or. App. 1974) involving an administrative planning and zoning process. He there summarized the methods of appeal as follows:

> It all turns on the scope of review when there is an appeal from a lower tribunal to a higher one. The possibilities are: (1) fully de novo, meaning a new evidentiary hearing . . . ; (2) de novo on the record . . . ; and (3) review of the record limited to ascertaining whether findings of fact are supported by substantial evidence . . . ."

524 P.2d at 1225.

The reference to either party bringing "a civil action" would suggest the full panoply of pleading, trial and decisional procedures as in an ordinary civil action. The seeming absolute right of either party to present evidence, and the requirement that the court base its decision "on the preponderance of the evidence" would seem to be consistent with that concept. However, the requirement that "the court" shall receive the records of the administrative proceedings" opens the possibility, at the election of the parties, to a de novo review on the record. If new evidence were presented in the court proceeding, I assume it is contemplated that the testimony in the administrative proceeding would be treated similarly to depositions taken for trial purposes which are read into the record. Since the statute requires the Court to base its decision "on the preponderance of the evidence" it is apparent that the findings and conclusions of the hearing officer and review officer carry no weight whatsoever and have no legal effect.

Reviewing the record in this case it is obvious that the parties have not approached this case consistently with the foregoing conclusions, since they, and the Court, initially, considered the review to be under the APA. In light of the foregoing considerations the record is possible deficient in several respects. First it is not clear that the issues have been definitively outlined in the record. In

this court, the petitioner filed a petition containing detailed factual and legal allegations, but there has never been an answer filed by the respondent School District. In the administrative proceeding there was what was denominated a "complaint", as required by the statute, in the form of a letter; however, the only response which I have found in the administrative record brought up to this Court is a letter from Martha Noffsinger of the State Department of Education, dated November 29, 1983, which restates the substance of plaintiff's complaint. These documents purport to frame the issues; however, in light of the briefing and argument I am not sure the parties contemplate that the issues are properly and completely framed by these two letters. Consistent with the APA approach, neither party requested the right to present additional evidence in this court. Again, it is not clear to me that the parties will be satisfied with the existing evidentiary record consisting of the documentary evidence and testimony given in the administrative proceedings, when no consideration or weight will be given to the administrative findings.

I find the existing evidentiary record adequate to decide the issues framed by the two letters used to initiate the administrative proceeding if both parties are agreeable to having the Court decide those issues on that evidence under the guidelines heretofore outlined. However, before that is done I believe it only fair to allow counsel to be heard if either one disagrees with the

Court's conclusions as to the scope and method of review heretofore outlined, or if either party desires to supplement the record with either further pleadings or evidence. I will allow the parties ten days within which to advise the Court of and further proceedings which either party desires to take in light of this decision as to the scope and method of review.

IT IS SO ORDERED.

DATED this 6th day of February, 1985.

/s/
J. Ray Durtschi
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GABRIEL THORNOCK, by his best friend and mother LANA (THORNOCK) BAUGH and LANA (THORNOCK) BAUGH,	)	CASE NO. 85493
Plaintiffs,	)	ANSWER
vs.	)	
BOISE INDEPENDENT SCHOOL DISTRICT NO. 1,	)	
Defendant.	)	

PRELIMINARY STATEMENT

This Answer is filed as a result of the Court's previous determination that these proceedings will not be treated by the Court as a civil action for judicial review of a final adminis-trative decision under Idaho's Administrative Procedure Act, but will be heard and deter-

mined by the Court as a civil action brought by the Plaintiffs as parties aggrieved with respect to the previous administrative findings and decisions under 20 USC Section 1515(e). Jerry Evans, the Idaho Department of Education, and Martha Noffsinger, were previously dismissed from this litigation as improper parties. Accordingly, counsel has eliminated these parties from the caption of this pleading. Also, counsel will now refer to Gabriel Thornock and Lana Baugh as Plaintiffs, and the Boise Independent School District No. 1 as the Defendant.

Although the Defendant does not consider the matters set forth in the Preliminary Statement portion of Plaintiffs' Amended Petition (Complaint) as formal allegations upon which Plaintiffs' claim for relief is based, the Defendant nevertheless feels it appropriate to respond and take issue with the manner in which Plaintiffs' Preliminary Statement interprets and characterizes the statutory and regulatory scheme affecting the parties' rights in this action.

The Defendant receives Federal funds pursuant to the EAHCA, commonly referred to as "Part B Funds", which are to be used to provide special education and related services to handicapped children residing in Defendant's jurisdiction. The acceptance of these Part B funds by the Defendant results in the imposition of a variety of obligations. With regard to children enrolled in its public schools, the Defendant is obligated to provide a

"free appropriate public education" (FAPE) for all handi-capped children. The Defendant is also obligated to provide a FAPE for those handi-capped children enrolled in private schools where the placement resulted from a referral by the Defendant after consultation with the child's parents. If the handicapped child is placed or referred in the private school by the School District, that child has all the rights he would have if enrolled in a public school, including the right to a FAPE. 20 USC Section 1413(a)(4)(B); 34 CFR Section 300.401(b).

However, if the child is referred to the private school voluntarily by the parents, and the private referral is not caused by the denial of a FAPE by the School District, then the School District's obligation to provide special education and related services is different. The School District is not obligated to provide all special education and related services necessary to constitute a FAPE to these children. However if these children would receive certain services provided through the District's Part B funds if they were enrolled in one of the District's public schools, or referred to a private school by the District, then the District must provide these children with a genuine opportunity for equitable participation and services that are comparable to Part B funded services provided public school children, if providing those services in consistent with the number, location, and relative needs of the handicapped children within the School District's jurisdiction, and the cost of meeting

those needs. 20 USC Section 1413(a)(4)(A)1; 34 CFR Section 300.451; 34 CFR Section 76.651; Section 3.13.2.1(a), Idaho Board of Education Rules and Regulations Pertaining to Special Education. Although the School District may be providing certain special education services to public school children, if those services are funded in any manner other than through Part B funds, then the School District is not obligated to provide comparable services to those private school children whose private placement was selected by the parent.

ANSWER

In response to Part III, entitled "Factual Allegations", of Plaintiffs' Amended Petition, Defendant hereby admits, denies, and alleges as follows:

I.

Defendant denies each and every allegation of Plaintiffs' Complaint not specifically admitted herein.

II.

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

III.

Plaintiff, Gabriel Thornock, being a minor, is an improper party to this litigation, and should be allowed to proceed in these proceedings only through a Court appointed guardian ad litem.

IV.

Defendant admits Paragraphs I through VII of the Factual Allegations in Plaintiff's Amended Complaint.

V.

Defendant denies Paragraphs VII and IX of Plaintiff's Factual Allegations.

VI.

Defendant admits Paragraph X of Plaintiff's Factual Allegations.

VII.

Defendant denies Paragraph XI of Plaintiff's Factual Allegations.

VIII.

Defendant admits the existence of the various decisions and orders by Judge Schwartzman in Ada County Civil Case No. 78074, and that the Defendants were aware of these proceedings, but deny Paragraph II of Plaintiffs' Factual Allegation since these Court records speak for themselves.

IX.

Defendants admit Paragraphs XIII and XIV of Plaintiffs' Factual Allegations.

X.

Defendant denies Paragraph XV of Plaintiffs' Factual Allegations. The procedures normally followed

by School District representatives at a child study team meeting with regard to an IEP for a public school child, or a private school child referred to the private school by the School District, was not followed since it had been previously made clear by the Plaintiffs that they were not interested in a public education. Since Plaintiffs had previously and unilaterally selected the private school placement. However, at said meeting, Defendant and Plaintiffs drafted a written educational plan for Gabriel which specified that certain related services would be provided to Gabriel, including the services of an occupational therapist, physical therapist, and a communications disorder specialist. These related services were comparable to all Part B funded services being provided by Defendant to other public school handicapped children with similar needs. The related services agreed upon, and the written educational plan drafted by the parties at said child study team meeting fully complied with Defendant's obligations under the EAHCA and Federal and State regulations promulgated pursuant thereto.

XI.

Defendant admits Paragraph XVI of Plaintiffs' Factual Allegations.

XII.

In response to Paragraph XVII of Plaintiffs' Factual Allegations, Defendant admits that a child study team meeting was held on November 15, 1983. As alleged

in Paragraph X of Defendant's Answer, the standard procedures followed by School District representatives pertaining to the preparation of an IEP for public school handicapped children, or private school handicapped children whose placement was pursuant to referral by the Defendant, was not followed due to the prior unilateral private placement by the Plaintiffs, which placement was reaffirmed by Plaintiffs as said meeting, which set forth the same related services described in Paragraph X above. The IEP process and written educational plan fulfilled Defendant's legal obligations due to the Plaintiffs' unilateral private placement decision.

XIII.

Defendant denies Paragraph XVII of Plaintiffs' Factual Allegations. Defendant admits to discussion at both child study team meetings in which representatives of the School District described some of the special education and related services that would be available to Gabriel should he seek public enrollment in the Boise School District. Since Plaintiffs had already unilaterally decided on a private placement, these discussions were not intended by Defendant to constitute a formal placement recom-mendation following a standard child study team meeting for the purpose of developing goals and objectives in an IEP for a handi-capped child seeking public placement. The discussions regarding some of the services available should Plaintiffs seek public enroll-

ment were intended only to be informative in nature, and to assist the Plaintiffs in arriving at an intelligent and informed decision to reaffirm their previous unilateral private placement.

XIV.

Defendant denies Paragraph XIX of Plaintiffs' Factual Allegations.

XV.

Defendant admits Paragraph XX of Plaintiffs' Factual Allegations.

XVI.

Defendant denies Paragraph XXI of Plaintiffs' Factual Allegations. At the hearing, the Defendant and its counsel did not contest whether Gabriel was receiving an appropriate education at St. Joseph's School, because it was irrelevant. Defendant did not concede this issue.

XVII.

In response to Paragraph XXII of Plaintiffs' Factual Allegations the Defendant knows that the testimony of the witnesses described therein are transcribed and of record in this case, the record speaks for itself, and the Defendant therefore denies Plaintiffs' allegations with regard to this evidence. The remaining allegations in Paragraph XXII refer to the prior proceedings of record in this case, and are therefore denied for the same reason.

XVIII.

Paragraphs XXIV through XXVIII of Plaintiffs'

Factual Allegations refer to prior matters of record in this case, and Defendant therefore denies Plaintiffs' allegations with regard thereto since the record speaks for itself.

XIX.

Defendant denies Paragraph XXIX of Plaintiffs' Factual Allegations.

XX.

In response to Part IV of Plaintiffs' Amended Petition (Complaint), entitled "Assignments of Error", Defendant denies all allegations set forth therein, since no error occurred in the prior administrative proceedings, and the record does not disclose that Plaintiffs are entitled to relief.

XXI.

Plaintiffs unilaterally decided on Gabriel's placement at St. Joseph's School without consultation with or upon recommen-dation of the Defendant, and at no time applied to the Defendant for public school placement. Because of Plaintiffs' unilateral decision on private placement, the Defendant is not obligated, nor has Defendant been given the opportunity, to provide a free appropriate public education to Gabriel.

XXIII. (sic)

A free appropriate public education was available to Gabriel and would have been provided one had he requested the same.

XXIV. (sic)

Defendant was and is obligated to provide Gabriel an opportunity for equitable participation in Part B funded benefits consistent with the number of eligible private school students, their needs, Part B funds available, and the program priorities established in compliance with the applicable statutes and regulations. With regard to Gabriel, the Defendant has fulfilled its obligation and provided Gabriel with all the services and opportunities required under the law.

XXV. (sic)

The Defendant does not provide any benefits to public school children with Part B funds which are comparable or even remotely similar to those services requested by Plaintiffs, and Defendant is therefore not obligated to provide the services requested by Plaintiffs.

DATED This _____ day of April, 1989.

STEWART A. MORRIS
Attorney for Defendant

UNITED STATES STATUES
20 U.S.C.S.

§ 1415. Procedural safeguards

(a) Establishment and maintenance. Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing. (1) The procedures required by this section shall include, but shall be limited to -

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are

not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State education agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an oppor-tunity for an impartial due process hear-

ing which shall be conducted by the State educational agency or by the local educational agency or intermediate education unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency. If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings. Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals wit special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which

findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a)(12) [20 USCS §1413(a)(12)].

(e) Civil action; jurisdiction. (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educa-

tional agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

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§300.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450 - 300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§300.500 - 300.514 of Subpart E.

DUE PROCESS PROCEDURES FOR PARENTS AND

§300.500 Definitions of "consent", "evaluation", and "personally identifiable".

As used in this part: "Consent means that:

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.,

"Evaluation" means procedures used in accordance with §§300.530 -300.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

§300.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of §§300.500 - 300.514.

§300.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in §§300.62 - 300.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

§300.503 Independent educational evaluation.

(a) General. (1) The parents of a handicapped child have the right under this part to obtain an independent educational of the child, subject to paragraphs

(b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with §300.301 of Subpart C.

(b) Parent right to evaluation at public expense. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under §300.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) Parent initiated evaluations. If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) Agency criteria. Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

§300.504 Prior notice; parent consent.

(a) Notice. Written notice which meets the requirements under §300.5505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) Consent. (1) Parental consent must be ob-

tained before:

(i) Conducting a pre-placement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for pre-placement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) Procedures where parent refuses consent. (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§100.506 - 300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§300.510 - 300.513.

(Authority: 20 U.S.C. 1415(b)(1)(C), (D))

Comment 1. Any changes in a child's special

education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

§300.505 Content of notice.

(a) The notice under §300.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes

or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraphs (c)(1) and (2) of this section have been met.

§300.506 Impartial due process hearing.

(a) A parent or a public educational agency may

initiate a hearing on any of the matters described in §300.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(Authority: 20 U.S.C. 1416(b)(2))

Comment: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of medication is not required by the statute or these regulations, an agency may wish to suggest medication in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Medications have been conducted by members of State educational agency personnel who were not previously involved in the particular case. In may cases, medication leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emo-

tional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

§300.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(Authority: 20 U.S.C. 1414(b)(2))

§300.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine,

and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decision. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the Stat advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

§300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were coexistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in §300.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under §300.512. (Authority: 20 U.S.C. 141(c), (d); H Rep. No. 94-664, at p.49 (1975))

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the STate educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in §300.508, relating to hearings, also apply.

§300.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under §300.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under §300.510 has the right to bring civil action under section 615(e)(2) of the Act.

§100.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

§300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

Comment. Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§300.514 Surrogate parents.

(a) **General**. Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in §300.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) **Duty of Public agency.** The duty of a public agency under paragraph (a) of this section includes the

assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) **Criteria for selection of surrogates.** (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) **Non-employee requirement; compensation.** (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraphs (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) **Responsibilities.** The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.